Supreme Court, U.S.
FILED
NOV 10 1992
OFFICE OF THE CLERK

(2)

No. 92-666

In The

Supreme Court of the United States

October Term, 1992

JERI EMMET LAIRD,

Petitioner,

v.

SIDNEY G. BLACKER, as Administrator of the Estate of Samuel Z. Winnikoff; Barry J. Post,

Respondents.

On Petition For A Writ Of Certiorari To The California Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived the right to challenge a California statute of limitations on federal constitutional grounds by failing to raise any federal issues until her petition for rehearing was filed in the California Supreme Court, a petition the supreme court summarily denied.

2. Whether petitioner waived the right to challenge a California statute of limitations on the specific federal grounds raised in her petition for writ of certiorari by failing to raise those particular federal questions in the lower court.

3. If petitioner preserved the right to challenge the California statute on federal grounds, whether her petition should be denied on the ground her due process and equal protection arguments are frivolous.

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

As discussed more fully below, this Court lacks jurisdiction to consider this case because Petitioner failed to raise any federal questions until her petition for rehearing to the California Supreme Court; the California Supreme Court never entertained or decided any of Petitioner's federal questions; Petitioner could not reasonably have been surprised by the decision of the California Supreme Court thereby excusing her failure to raise the issues earlier; and, with one exception, Petitioner raises entirely new federal questions in her Petition to this Court.

STATEMENT OF THE CASE

The sole issue presented to the state courts in this case was the proper construction of California Code of Civil Procedure section 340.6, the statute of limitations which governs legal malpractice suits. Section 340.6 provides the one-year statute of limitations on such actions commences to run when (1) the client discovers, or should have discovered, that his attorney was negligent, (2) the client suffers "actual injury" as a result of the negligence, and (3) the attorney-client relationship is severed. Here, Petitioner discovered her attorneys' alleged negligence and terminated her relationship with them more than one year before filing suit. The issue below was whether she suffered "actual" injury when, also over a year before her suit was filed, the lawsuit she had retained her attorneys to prosecute was dismissed, the dismissal being the basis for her malpractice claim. The California Supreme Court held the dismissal of Petitioner's suit was an "actual injury" sufficient to trigger the statute of limitations. It rejected Laird's claim that she suffered no actual harm until she abandoned her appeal of the dismissal less than a year before suing her attorneys.

The California Supreme Court's decision was based on the legislative history of section 340.6 as well as prior decisions of the court defining the term "actual injury" in the context of legal malpractice suits. Petitioner did not raise, and the California Supreme Court did not discuss, any state or federal constitutional issues. In her petition for rehearing to the California Supreme Court, Petitioner for the first time alluded to the argument that section 340.6 or the lower court's interpretation of it violated the

United States Constitution. The supreme court summarily denied the petition. App. C. at 146.[1]

REASONS WHY THE PETITION SHOULD BE DENIED

I. Petitioner Failed To Timely Raise, And The State Court Never Entertained And Decided, Petitioner's Federal Questions Despite Petitioner's Ability To Anticipate The State Court's Bases Of Decision.

Petitioner concedes she raised her federal questions *for the first time* in her petition for rehearing to the California Supreme Court. Petition for a Writ of Certiorari to the California Supreme Court ("Petn.") at 7. The California Supreme Court summarily denied the petition for rehearing without discussing the federal questions. App. C at 146.

"The long established general rule is that an attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the [state] court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). *See Estate of Wilson v. Aiken Indust.*, 439 U.S. 877, 879 (1978) (Blackmun, J., concurring in the denial of the petition for a writ of certiorari); *Radio Station WOW v. Johnson*, 326 U.S. 120, 128 (1945); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.21(c), at 155-56 (6th ed. 1986); *see also Yee v. City of Escondido, Cal.*, ___ U.S. ___, 112 S.Ct. 1522, 1531 (1992) (Court refused to decide due process issue raised for the first time in a petition for review to the California

[1] "App." refers to an appendix to the Petition.

Supreme Court, which declined discretionary review). Without doubt, the California Supreme Court did *not* entertain and decide any federal questions in its one-sentence denial of the petition for rehearing.

Petitioner argues she falls within an exception to the rule barring consideration of the federal questions raised for the first time in a petition for rehearing because the federal questions were created by an unanticipated decision of the highest state court, and the petition for rehearing therefore presented the first opportunity to raise the federal question. Petn. at 7; *Herndon*, 295 U.S. at 443-44; Stern et al., *supra*, at 156. This argument is without merit.

The California Supreme Court *affirmed* the decision of the California Court of Appeal and *adopted* the court of appeal's interpretation of California Code of Civil Procedure section 340.6. Although the outcome of the case in the California Supreme Court was not foreordained, the decision hardly contained the "enormous element of surprise" contended by Petitioner. Petn. at 7. Based upon the California Court of Appeal decision in this case, Petitioner reasonably could have anticipated the California Supreme Court would adopt the court of appeal's rationale. Petitioner therefore *could have raised* the federal questions in the briefs she filed in the California Supreme Court, rather than raising these issues for the first time in her petition for rehearing.

This case is similar to *Herndon*, where this Court held that the appellant was bound to anticipate the interpretation given a statute by the Georgia Supreme Court because that court decided another case a few months

earlier construing the same statute. *Herndon*, 295 U.S. at 445-46.

> Appellant, of course, cannot plead ignorance of the [earlier] ruling . . . , and was therefore bound to anticipate the probability of a similar ruling in his own case, and preserve his right to a review here by appropriate action upon the original hearing in the court below.

Id. at 446.

Like the earlier Georgia Supreme Court decision in *Herndon*, the decision of the California Court of Appeal in this case put Petitioner on notice that the case could be decided on identical grounds by the California Supreme Court. Without an element of surprise, Petitioner has no excuse for failing to raise the federal questions earlier than in the petition for rehearing. For this reason alone, this Court should deny the petition for certiorari, as this Court did with the petition in *Herndon*.

II. Even If Petitioner Timely Raised Federal Questions In Her Petition For Rehearing To The California Supreme Court (She Did Not) And This Court Ignores The California Supreme Court's Failure To Entertain Or Decide The Federal Questions (It Should Not), This Court Should Deny The Writ Of Certiorari Because Petitioner Raised *Different* Federal Questions In Her Petition.

Petitioner raises four claims in her petition to this Court: the state statute at issue is vague and overbroad in violation of the due process clause of the Fourteenth Amendment; the statute violates the equal protection clause of the Fourteenth Amendment because it singles

out for discriminatory treatment victims of legal malpractice; the California Supreme Court's retroactive interpretation of the statute violates the due process clause of the Fourteenth Amendment; and the California Supreme Court's interpretation of the statute constitutes a taking of property without due process of law in violation of the Fourteenth Amendment.

Of these claims, only the second claim, for equal protection, was alluded to in the petition for rehearing.[2] Although Petitioner raised a claim under the due process clause of the Fourteenth Amendment, the claim did not involve vagueness, overbreadth, retroactivity, or an

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[2] Petitioner made a three sentence equal protection argument in her petition for rehearing to the California Supreme Court. Although Petitioner failed to include the petition for rehearing in an appendix to her petition to this court, the entirety of her equal protection argument (excluding footnotes) reads:

> **2. The statute of repose violates the equal protection provision of the federal constitution.**
>
> Appellant is entitled to the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States. Although an individual injured by an attorney need [sic] protection, the fortuitous timing of the injury classifies the individual as to whether or not he will be allowed to pursue a remedy.
>
> The U.S. Supreme Court in *Reed v. Reed* (1971) stated the test for a statute which accorded different treatment to persons by placing them in classes.

Plaintiff and Respondent Jeri Emmet Laird's Petition for Rehearing after a Decision by the California Supreme Court filed May 22, 1992 ("Petn. for Rehearing") at 21.

unconstitutional taking. Instead, Petitioner, citing *Wilson v. Iseminger*, 185 U.S. 55 (1902), argued that section 340.6 violates the due process clause because in some circumstances it fails to provide a reasonable time in which to bring a cause of action.[3] *See id.* at 62-64.

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[3] After citing the text of the Fourteenth Amendment, Petitioner's due process argument, in its entirety, was as follows:

> Appellant is entitled to the due process guarantees of Section 1 of the Fourteenth Amendment of the Constitution of the United States. The due process aspects of statutes of limitations were reviewed by the U.S. Supreme Court in *Wilson v. Iseminger*, 185 U.S. 55, 22 S. Ct. 573 (1902). The court at page 575 stated:
>
> > . . . it may be properly conceded that all statute [sic] of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts. A statute could not bar the existing rights of claimants without affording this opportunity; if it should attempt to dos, [sic] it would not be a statute of limitations, but an unlawful attempt to extinguish rights arbitrarily, whatever might be the purport of its provisions. It is essential that statutes allow a reasonable time after they take effect for the commencement of suits upon existing causes of action. . . .
>
> The statutory language (deprivation of "rights, privileges, or immunities secured by the Constitution or laws") covers deprivations of Fourteenth Amendment rights. *Monroe v. Paper* [sic] (1961) 365 U.S. 167, 81 S.Ct. 473, 475, 5 L.Ed.2d 492, 496.
>
> The following are significant rights and liberties held to be fundamental and therefore within the protection of the Due Process Clause: the right to acquire, enjoy, own and dispose of property. *Shelley v. Kraemer* (1948) 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; *Sei Fujii v. California* (1952) 38 Cal.2d 718, 242 P.2d 617.

It is not enough that Petitioner raised *a* due process argument in the state court below. Instead, Petitioner must raise *the same* due process argument. In *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988), the Court refused to consider a due process argument raised for the first time in the Supreme Court, despite the fact that the petitioner in the state court below raised a different due process challenge. *Id.* at 75 n.1, 77-80; *see also G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 412 n.7 (1982) (Court refused to consider due process argument even though Petitioner raised a different due process argument in federal court of appeals); *but see Bankers Life and Casualty*, 486 U.S. at 86-87 (O'Connor, J., concurring in part and concurring in the judgment) (because petitioner invoked a due process argument below, the Court should examine the argument to determine if it is "only an enlargement" of the argument raised below).[4]

> Section 340.6 does not provide a "reasonable time" for the commencement of an action by a consumer who is injured one day before the period ends, nor does it provide a reasonable time for appellant who was injured after the period had run. In fact, the statutes [sic] does not only *limit* the time to bring an action, but also *removes the remedy* of injured parties such as the appellant. The result is an unlawful attempt to extinguish rights arbitrarily, thereby violating the constitutional protection of due process of law.

Petn. for Rehearing at 20-21.

[4] Even under Justice O'Connor's standard, the vagueness, overbreadth, retroactivity, and takings arguments are not merely "enlargements" of the argument raised below that the statute in question violated due process because it failed to provide a reasonable time in which to bring a cause of action.

Thus, Petitioner's equal protection argument remains the only federal question raised below (even then, it was raised at the very last moment) *and* appearing in the questions presented. This Court, at minimum, should refuse to consider the other arguments raised in the petition.

III. This Court Should Deny The Writ Because Petitioner's Federal Questions Are Frivolous.

A. There Is No Merit To Petitioner's Contention That California Code Of Civil Procedure Section 340.6 Is Vague Or Overbroad.

California Code of Civil Procedure section 340.6 provides that the statute of limitations on a client's legal malpractice suit does not begin running until the client suffers "actual injury" as a result of the attorney's wrongful act. In her first question presented, Petitioner contends section 340.6 violates the due process clause of the Fourteenth Amendment on the grounds of vagueness or overbreadth because it is unclear whether the words "actual injury" refer to "appreciable injury" or "irremediable injury." Petitioner's due process challenge fails because it ignores the governing rule that in analyzing a facial challenge to a state statute, this Court will consider not only the language of the statute itself but also the construction of the statute adopted by state courts. If the statute as construed by court decisions is clear, it passes constitutional muster. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n.5 (1982) (Marshall, J., for a unanimous Court) ("In evaluating a facial challenge to a state law, a federal court must, of

course, consider any limiting construction that a state court or enforcement agency has proffered"); *Wainwright v. Stone*, 414 U.S. 21, 22-23 (1973) ("For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it' ").

Given the manner in which the term "actual injury" has been defined in California decisions, including this case, Petitioner's contention that the language is ambiguous, and that it is unclear whether the term refers to injury which must be "irremediable," is without merit.[5]

In its present opinion, the California Supreme Court expressly rejected Petitioner's contention that the term "actual injury" could be construed to mean "irremediable injury." The court ruled:

> [Petitioner] contends that several Court of Appeal cases support her assertion that the negligence caused by the malpractice must be "irremediable" before the statute of limitations under section 340.6 will begin to run. . . . [] Her position is unpersuasive.

App. A at 35.

The court went on to note that the court of appeal in the instant case had properly criticized prior cases "for relying on the 'irremediable damage' rule rejected by the

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[5] Petitioner's overbreadth challenge, which she supports with neither argument nor citations to applicable cases, must fail because she has not alleged section 340.6 reaches any constitutionally protected conduct. *See Village of Hoffman Estates*, 455 U.S. at 494. Thus, we discuss only her vagueness argument.

Legislature when it adopted section 340.6." *Id.* at 41-42. Finally, the court explained that its interpretation of the term "actual injury" "is based on the Legislature's rejection of the 'irremediable damage' rule of *Heyer v. Flaig, supra,* 70 Cal.2d 223. . . . " App. A at 54.[6] In light of the foregoing language, Petitioner's contention that section 340.6 is impermissibly vague and that it is not clear whether an injury must be "irremediable" before the statute of limitations commences to run is frivolous.

Nor is there merit to the argument that the term "actual injury" is unconstitutionally vague because the court never defined that term. Petn. at 16. As Petitioner acknowledges, when the California Legislature enacted section 340.6, it codified the existing tolling rules on legal malpractice suits which the California Supreme Court had adopted in *Budd v. Nixen,* 6 Cal. 3d 195 (1971) and *Neel v. Magana,* 6 Cal. 3d 176 (1971), including the rule that the statute of limitations on legal malpractice suits is tolled until the client suffers "actual injury." Petn. at 18-19, citing CALIFORNIA SENATE COMMISSION ON JUDICIARY REPORT (May 17, 1977); App. A at 19-20. In *Budd v. Nixen,* 6 Cal. 3d at 201, the court made clear that when it used the phrase "actual injury," it meant "[a]ny appreciable and actual harm flowing from the attorney's negligent conduct. . . . " *Id.* For example, the court explained that a client suffers "actual" injury if he incurs unnecessary fees

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[6] The court's ruling that an injury need not be "irremediable" under the statute led it to conclude that an appeal does not toll the time in which to file an action for legal malpractice. App. A at 35-36.

or expenses during the course of a trial as a result of an attorney's misconduct. *Id.* at 201-02.

In the present case, the California Supreme Court reaffirmed its earlier holding in *Budd*, ruling that when the legislature enacted section 340.6, it "used the term 'actual' to focus on the *fact* that damage occurred, and eliminated all qualifiers to prevent confusion that would arise by requiring courts to consider the total amount of damages." App. A at 28 (emphasis added).

Both on its face and as defined in this and prior cases, the term "actual injury" is sufficiently clear and self-explanatory to satisfy due process requirements.

B. Petitioner's Equal Protection Argument Is Without Merit.

In her second question presented, Petitioner argues section 340.6, which tolls the time period in which to bring a legal malpractice action until plaintiff has suffered an "actual injury," deprives litigants in legal malpractice cases of equal protection of the laws under the Fourteenth Amendment because lawsuits against other professionals are tolled until the plaintiff suffers "irremediable injury." Petitioner's argument is without merit.

As a factual matter, Petitioner is wrong when she asserts that legal malpractice suits are treated differently from other tort suits under California law. Whether governed by common law or statute, the statutes of limitation on tort suits in California generally commence running once the plaintiff has notice of the defendant's misconduct and suffers actual injury as a proximate result. *See,*

e.g., *Budd*, 6 Cal. 3d at 200; CAL. CIV. PROC. CODE § 340.5 (West 1982) ("In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first".) Indeed it is hornbook law that an action for general negligence requires actual loss or damage and that "the statute of limitations is generally held not to begin to run against a negligence action until *some* damage has occurred." W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 30, at 165 (5th ed. 1984) (emphasis added).

We are not aware of any statute of limitation, and Petitioner has not cited one, which requires "irremediable" injury before the limitations period begins to run. To the contrary, irremediable injury generally is *not* a requirement of most tort suits. For example, pursuant to section 340.5, the limitations period which governs medical malpractice suits begins running once the plaintiff has been injured even if the plaintiff's injury can be corrected or cured by later treatment, i.e., even though the plaintiff's injury is not "irremediable."

Even if Petitioner's claim that section 340.6 imposed more stringent time limits on legal malpractice suits were correct, Petitioner's contention that the disparate treatment of legal malpractice plaintiffs constitutes a violation of equal protection fails because an equal protection challenge must be evaluated under "rational basis" review

and the statute of limitation at issue here easily meets that standard.[7]

In *G.D. Searle & Company*, 455 U.S. 404, the petitioner, a foreign corporation sued in a products liability action, argued a New Jersey statute which tolls the period for an action against a foreign corporation that is amenable to jurisdiction in New Jersey courts but that has no person or officer in New Jersey upon whom process may be served violated the equal protection clause of the Fourteenth Amendment. *Id.* at 405. Had the petitioner been a New Jersey corporation, the suit against it would have been barred by the statute of limitations. In rejecting Petitioner's equal protection argument, this Court first set out the applicable standard to review this type of equal protection challenge:

> In the absence of a classification that is inherently invidious or that impinges upon fundamental rights, a state statute is to be upheld against equal protection attack if it is rationally related to the achievement of legitimate governmental ends. *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981). The New Jersey tolling provision need satisfy only this constitutional minimum. As this court explained in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314, 65 S.Ct. 1137, 1142, 89 L.Ed 1628 (1945):
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> > "[Statutes of limitation] represent a public policy about the privilege to litigate. Their shelter has never been regarded as what is

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[7] Petitioner fails to cite a single federal case setting out the standard of review applicable to equal protection claims.

> now called a 'fundamental' right or what used to be called a 'natural' right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to relatively large degree of legislative control."

G.D. Searle & Co., 455 U.S. at 408.

Applying this standard in *G.D. Searle*, the Court found a number of rational reasons supporting tolling the limitation period for unrepresented foreign corporations despite the institution of long-arm jurisdiction in New Jersey. *Id.* at 410. For example, the Court recognized that unrepresented foreign corporations remain potentially difficult to locate. *Id.*

Similarly, in *Montagino v. Canale*, 792 F.2d 554, 557 (5th Cir. 1986), the Fifth Circuit, applying rational basis scrutiny, rejected an equal protection challenge to a Louisiana statute of limitations which differentiated Louisiana medical malpractice victims and ordinary tort victims. The Court noted that the Louisiana statute was enacted to alleviate "the insurance crisis by reducing malpractice claims, thereby reducing medical malpractice insurance rates, resulting in health care being more accessible to patients at reasonable costs." *Id*, quoting *Valentine v. Thomas*, 433 So.2d 289, 292 (La. App. 1983).

In the present case, as in *Montagino*, a state legislature enacted a statute with the express goal of reducing the cost of malpractice insurance and making such insurance easier to obtain. California Senate Commission on Judiciary, Fact Sheet on Legal Malpractice: Statute of

LIMITATIONS – AB 298 (March 25, 1977). Applying the "rational basis" standard to the instant case, it is clear that the California Legislature rationally could have adopted a stricter legal malpractice statute of limitations in order to alleviate the malpractice burden on lawyers and insurers, and ultimately, clients.

Because this Court would review Petitioner's equal protection challenge under the rational basis test, and the California Legislature clearly had a rational basis for limiting legal malpractice claims, Petitioner's equal protection argument is insubstantial. It does not provide a reason for granting the petition.

C. The Retroactivity Of The California Supreme Court Decision Does Not Impinge Upon Petitioner's Due Process Rights.

In her third question presented, Petitioner argues the California Supreme Court's decision to apply its interpretation of section 340.6 retroactively violated her due process rights under the Fourteenth Amendment. The California Supreme Court rejected Petitioner's argument that retroactive application of its decision violated *state* law. App. A at 52-55.[8] In rejecting Petitioner's argument, the California Supreme Court noted that its decision was in accordance with the legislative history of section 340.6

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[8] As noted in Section II, *supra*, Petitioner did not raise and the California Supreme Court never entertained or decided any argument that retroactive application of the decision violated *federal* law.

and with the manner in which the statute had been applied by prior cases.

> Our application of these cases to the facts before us does not, therefore, represent a departure from generally accepted principles. We conclude that there is no compelling reason in this case to depart from the general rule of retroactive application of judicial decisions.

Id. at 54.

Petitioner now claims that the United States Constitution is violated by retroactive application of the California Supreme Court interpretation of section 340.6. Petitioner's federal claim is based on the same faulty premise which underlay her state claim – that the California Supreme Court changed the law. As that court correctly observed, its decision did not represent a departure from established law. Prior decision had uniformly ruled that legal malpractice actions accrued when an adverse judgment was entered and that the statute of limitations was not tolled by an appeal. *See Budd v. Nixen*, 6 Cal. 3d at 202; *Neel v. Magana*, 6 Cal. 3d at 183; *Degarmo v. Luther T. Mayo, Inc.*, 4 Cal. App. 2d 604, 606 (1935). No California court had ever reached a contrary result. While several courts had mistakenly used the term "irremediable" to describe the type of injury a client must suffer before a cause of action accrued, no court had ever construed the term "irremediable" to mean that the underlying case was no longer subject to appeal, the construction advocated by Petitioner. Thus, the California Supreme Court decision therefore did not represent a departure from past law.

Petitioner's federal retroactivity argument fails for the additional reason that where a case involves an issue of state law, the state courts have wide discretion to determine the retroactivity of their own decisions. *See Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932); *American Trucking Ass'n v. Smith*, ___ U.S. ___, 110 S.Ct. 2323, 2330 (1990).

D. The California Supreme Court Decision Is Not An Unconstitutional Taking In Violation Of The Fourteenth Amendment.

In her final question presented, Petitioner argues the California Supreme Court's conclusion her action against her attorneys was barred by the statute of limitations constitutes a taking of property without due process of law in violation of the Fourteenth Amendment. Petitioner's argument lacks merit.

Petitioner's argument, although styled as a "takings" claim, is merely another challenge to the correctness of the California Supreme Court's interpretation of section 340.6. *See* Petn. at 46-47 ("The *Laird* court, in direct contradiction to the language of section 340.6, wrongfully subsumes the actual-injury inquiry into the separate question of when the client discovered or should have discovered the alleged negligence"). Petitioner has failed to cite a single case supporting the proposition that an adverse decision of a state court, even if wrong, constitutes the "taking" of property in violation of the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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